IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.278 OF 2006

1. Waman Bhila Patil,)
   Age: 55 yrs, Occ: Agriculture,)

2. Vyankat Bhila Patil,)
   Age: 49 yrs, Occ: Agriculture,)

3. Uttam Bhila Patil,)
   Age: 45 yrs, Occ: Agriculture,)

4. Shivaji Bhila Patil,)
   Age: 38 yrs, Occ: Agriculture,)

   Nos.1 to 4 R/o.Babhulwadi,)
   Taluka Nandgaon, District Nashik.)...Appellants

Versus

Jagannath Tarachand Kasliwal,)
Since deceased through his legal heirs:)

1. Dhannalal Jagannath Kasliwal,)
   Age: 68 yrs.,)

2. Pannalal Jagannath Kasliwal,)
   Age: 65 yrs.,)

3. Manikchand Jagannath Kasliwal,)
   Age: 63 yrs.,)
   Deceased through his legal heirs:)

3a. Anilkumar Manikchand Kasliwal,)
   Age: 46 yrs., Occ:Children Specialist)
   R/o.Near Ashok Stambh, Nashik,)

3b. Sunilkumar Manikchand Kasliwal,)
   Age: 42 yrs., Occ:Trade,)
   R/at Manmaqd, Tal.Nandgaon,)
   District Nashik,)

3c. Kamalabai w/o Manikchand Kasliwal,)
   Age: 64 yrs., Occ:Household,)
   R/o.Nandgaon, Tal.Nandgaon,)
   District Nashik,)

3d.Meena w/o Ashokkumar Jain,)
Age: 45 yrs., Occ:Household,)
R/o.Gondia (M.P.))

4. Gulabchand Jagannath Kasliwal,)
Age: 59 yrs.,)

5. Ramanlal Jagannath Kasliwal,)
Age: 55 yrs.,)

6. Vijaykumar Jagannath Kasliwal,)
Age: 49 yrs.,)

7. Nandlal Jagannath Kasliwal,)
Age: 48 yrs.,)

8. Rikhabchand Jagannath Kasliwal,)
Age: 45 yrs.,)

Occupation of Nos.1 to 3 and 5 to 8)
Agriculture and Trade,)
Occupation of No.5 Agriculture and)
Medical Practitioner)

Nos.1 to 3,5,6 and 8 R/o.Nandgaon,)
Taluka Nandgaon, District Nashik)

No.4 R/o Vijay Nursing Home, Bali,)
West Sholapur)

No.7 R/o/Ghankar Lane, Nashik,)
District Nashik)

9. Sadalkuwarbai w/o Jaykumar Kala,)
Age: 58 yrs., Occ: Household,)
R/o.Near Purna Pool, Hyderabad)

10.Shantabai w/o Fulchand Patni,)
Age: 47 yrs., Occ: Household,)
R/o.Andheri, Taluka Silod,)
District Aurangabad.)..Respondents

Shri P.N.Joshi for the Appellants.
Shri K.K.Tated for the Respondent Nos.1,2,5,6 and 8.

CORAM : ABHAY S.OKA, J.

DATE ON WHICH SUBMISSIONS WERE HEARD : JULY 16th, 2007.

DATE ON WHICH JUDGMENT IS PRONOUNCED : SEPTEMBER 19th, 2007.

JUDGMENT:

1. I have heard the learned counsel appearing for the parties on the following substantial question of law:

. "Whether a suit for possession filed by the Respondent-auction purchaser in execution is maintainable in law in view of section 47 of the Code of Civil Procedure, 1908?"

2. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The property subject matter of the dispute is Gat No.1 admeasuring 6 Hectre 12 Are from village Balwantwadi, Taluka Nandgaon, District Nasik. The suit property was purchased by the deceased original Plaintiff in auction in execution of the decree passed in Regular Civil Suit No.62 of 1969. The sale was effected on 23rd September, 1971. The predecessor of the present Appellants filed an Application for setting aside the same. On 16th August, 1973 the sale in favour of the Respondent (original Plaintiff) was confirmed by

the Executing Court. A suit was filed by the Respondent-auction purchaser for possession of the suit property. The said suit was dismissed by the learned trial Judge by holding that the suit was not maintainable on the ground that the only remedy available for the Plaintiffs was to apply under Rule 95 Order XXI of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code). An Appeal was preferred by the Respondents before the District Court. By the impugned Judgment and Decree the said Appeal has been allowed by the District Court and a decree for possession has been passed in favour of the Respondents.

3. The learned counsel for the Appellants submitted that a liberal construction is required to be put upon section 47 and therefore, if the judgment debtor offers any resistance to the delivery of possession to the auction purchaser, the questions raised by the judgment debtor will be one which relate to execution or discharge or satisfaction of the decree and the said questions will be arising between the parties to the suit. He submitted that all questions arising between the auction purchaser and judgment debtor must be determined by the Executing Court and not by a separate suit. He placed reliance on decision of the Apex Court

in the case of **Harnandrai Badridas Vs. Debidutt Bhagwati Prasad & Ors ((1973) 2 Supreme Court Cases Page 467)**. He relied upon clauses (a) and (b) of explanation II of section 47 of the said Code and submitted that the bar of suit under sub-section 1 of section 47 will be squarely applicable to the suit by an auction purchaser. The learned counsel appearing for the Appellants submitted that the law of limitation provides for a limited period to enable the auction purchaser to apply under Rule 95 of Order XXI of the said Code and there is no provision for condonation of delay in filing the said Application. He, therefore, submitted that the suit filed by the Respondent six years and more after the confirmation of sale was not maintainable. The learned counsel appearing for the Respondents invited my attention to various decisions of the Apex Court and Privy Council and submitted that the auction purchaser not being a party to the original suit in which decree under execution is passed can always file an independent suit for recovery of possession.

4. I have considered the submissions. The Appellants have heavily relied upon the decision of the Apex Court in the case of Harnandrai Badridas (supra). The Apex Court in the said case was dealing with the issue involved in this Second Appeal. In paragraph 5

the Apex Court observed thus:

> "5. As we have already said, the appellant relied on the Full Bench decision of the Lahore High Court. We have carefully gone through the various decisions cited before us and we find ourselves in agreement with the opinion of the full bench of the Calcutta High Court in Kailash Tarafdar's case (supra). If a confirmation of the sale would finally terminate all questions as to execution of the decree it is difficult to appreciate why the Legislature would frame such rules as Rules 95 to 102 under Order XXI of the Code of Civil Procedure. We are in respectful agreement with G.K.Mitter, J., that the Legislature must have though that the duty of the executing court should not end with the confirmation of the sale and it is because the Legislature though "that the auction-purchaser should have the right of applying for possession under the provisions of Rules 95 and 96 that proceedings for obtaining possession were included in the catena of rules relating to the execution of the decree".

In paragraph 6 of the said decision the Apex Court held that section 47 of the said Code deserves liberal construction. The Apex Court held that the auction purchaser will retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. In paragraph 8 the Apex Court held thus:

> "8. It is important to remember that after the decision of the Privy Council in Ganapathy's case (supra), there has been an amendment of Section 47 as a result of which the purchaser at a sale in execution of a decree, whether he is the decree-holder or not, is unquestionably a party to the suit for the purpose of Section 47. **Having regard to this, all questions arising between the auction-purchaser and the judgment-debtor must in our view be determined by the executing court and not by a separate suit**". (Emphasis supplied)

5. The ratio of the decision of the Apex Court is based on the decision of the Privy Council in the case of **Ganpathy Vs. Krishnamachariar (AIR 1917 Privy Council 121)**. It must be stated here that the Apex

Court in the case of Harnandrai Badridas (supra) was dealing with a case arising before the amendment was made to the said Code by Act No.104 of 1976. Explanation II of section 47 was brought on the statute book by the said amendment. The second decision relied upon by the learned counsel appearing for the Appellant does not deal with the issued involved in this Second Appeal. He placed reliance on the said decision only to show that under Article 134 of the Limitation Act, 1963, a period of limitation of one year has been provided to apply for delivery of possession of the property sold in auction from the date on which the sale becomes absolute.

6. It will be necessary to refer to decision of the Apex Court in the case of **Pattam Khader Khan Vs. Pattam Sardar Khan & Ors [1997 (1) BCJ 110 (SC)]**. It will be necessary to refer to the facts of the case before the Apex Court. In execution of a decree for partition and separate possession the Court ordered sale of the property as the property was not partible. The first Respondent before the Apex Court purchased the property in auction in the year 1984. The auction sale was confirmed on 07th August, 1984 and sale certificate was issued on 09th November, 1989. An Application was made by the auction purchaser under Rule 95 of Order XXI of

the said Code. An objection as raised that in view of the period of limitation prescribed under Article 134 of the said Act of 1963, no order can be passed in favour of the first Respondent for delivery of possession. The objection regarding limitation was upheld by the Executing Court. The High Court reversed order of the Executing Court which was challenged by way of a Special Leave Petition. The Apex Court considered the scheme of the auction sale under Order XXI of the said Code. The Apex Court held that the title of the Court auction purchaser becomes complete on the confirmation of sale under Rule 92 of Order XXI of the said Code and by virtue of section 65 of the said Code the property vests in the purchaser from the date of the sale. In paragraph 10 of the said decision the Apex Court held thus:

> "10. There can be a variety of factors conceivable by which delay can be caused in issuing the sale certificate. The period of one year limitation, now prescribed under Article 134 of the Limitation Act, 1973, in substitution of a three year period prescribed under Article 180 of the Indian Limitation Act of 1908, is reflective of the legislative policy of finalising proceedings in execution

> as quickly as possible by providing a quick forum to the auction-purchaser to ask delivery of possession of the property rather than from the date of issuance of the sale certificate. **On his failure to avail such quick remedy the law relegates him to the remedy of a suit for possession in a regular way**". (Emphasis supplied)

7. It will be necessary to refer to an old decision of Division Bench of this Court in the case of **Balvant Santaram Vs. Babaji Sambhapa (The Indian Law Reporter Vol.VIII 602)**. The Division Bench considered the provisions of section 328 of the Code of Civil Procedure of the year 1882 which is on par with Rule 95 of Order XXI of the said Code of 1908. It was held that failure on the part of the auction purchaser to avail himself of the remedy under section 328 of the said Code will not prevent him from proceeding against the Defendant by a regular suit.

8. What has been held by the Apex Court in the case of Pattam Khader Khan (supra) is that on confirmation of the sale, the auction purchaser becomes the owner of the property and therefore right to file a suit for recovery of possession of the property purchased by him in

auction is always available. In the case of **Balakrishnan Vs. Malaiyandi Konar [(2006) 3 Supreme Court Cases Page 49]**, the Apex Court referred to its earlier judgment in the case of Pattam Kader Khan (supra) and held in paragraph No.13 thus:

> ". The period of one year limitation now prescribed under Article 134 of the Limitation Act in substitution of a three-year period prescribed under Article 180 of the Limitation Act, 1908 is reflective of the legislative policy of finalising proceedings in execution as quickly as possible by providing a quick forum to the auction-purchaser to ask for the delivery of possession of the property purchased within that period from the date of the sale becoming absolute rather than from the date of issuance of the sale certificate. **On his failure to avail such a quick remedy the law relegates him to the remedy of a regular suit for possession based on title, subject again to limitation**". (Emphasis supplied)

Therefore, considering the two recent decisions of the Apex Court, the Appellate Court was right in holding

that the suit for possession by auction purchaser was maintainable.

9. Thus, there is no merit in the case made out by the Appellants. Hence, the Second Appeal is dismissed with no orders as to costs.

JUDGE